

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

Jeanne Llera, *et al.*,

Case No. 2:20-cv-01589-RFB-BNW

Plaintiffs,

V.

Las Vegas Metropolitan Police Department, *et al.*,

Defendants.

ORDER re ECF No. 77

Before the Court is Defendant John Squeo's Motion for Sanctions. ECF No. 77.

Defendants Dan Emerton, Vernon Ferguson, Ryan Fryman, Las Vegas Metropolitan Police Department, and Andrew Lochman filed a joinder at ECF No. 83. Plaintiffs Jorge Luis Gomez and Jeanne Llera opposed at ECF No. 91, and Defendant Squeo replied at ECF No. 97. The Court held an evidentiary hearing on September 20, 2022. ECF No. 111.

The Court has reviewed the parties' briefs and attached exhibits as well as the testimony and evidence presented at the evidentiary hearing.¹ For the reasons discussed below, the Court denies Defendants' motion for sanctions.

I. Background

The tragic incident involving the death of Jorge Antonio Gomez took place on June 1, 2020, during a protest in downtown Las Vegas. At some point during the demonstration, and for disputed reasons, law enforcement officers fired their weapons at him, which resulted in his death. Jorge Antonio Gomez is the son of Plaintiffs Jeanne Llera and Jorge Luis Gomez.²

Defendants seek terminating sanctions against both Plaintiffs for spoliating evidence. ECF No. 77 at 4, 14, 18. In the alternative, they ask that the Court adopt an adverse inference

¹ Plaintiffs stipulated to the Court considering the exhibits attached to the parties' briefing, and Defendants stipulated to admitting all attached exhibits with the exception of Exhibits B and H attached to Plaintiff's opposition. ECF Nos. 117, 118. The Court has not considered either of these contested exhibits.

² In an attempt to avoid confusion, the Court will refer to Jorge Antonio Gomez as Jorge Antonio and Jorge Luis Gomez as Jorge Luis.

1 instruction against Plaintiffs. *Id.* at 14–15, 18. Defendants argue that Plaintiffs (1) destroyed
 2 messages between Ms. Llera and Berklee Guest (2) destroyed evidence between Ms. Llera and
 3 Rayce Rayos, (3) removed contents from Jorge Luis’ truck, and (4) destroyed documents relating
 4 to the towing of Jorge Luis’ truck. *Id.* at 1–4.

5 **II. Discussion**

6 **1. Ms. Llera’s Signal Communications with Ms. Guest**

7 **A. Parties’ Arguments**

8 Defendants argue that “Ms. Llera asked Ms. Guest to communicate with her through
 9 Signal” after Defendant Squeo “subpoenaed Ms. Guest to obtain her communications with
 10 Plaintiffs[.]” ECF No. 77 at 3. But, according to Defendants, Ms. Guest does not have copies of
 11 the Signal communications, nor does she remember what she and Ms. Llera discussed through
 12 Signal. *Id.* Defendants’ position is that Ms. Llera’s decision to communicate with Ms. Guest
 13 using Signal is an “intentional and egregious” effort to spoliate evidence. *Id.* As a result,
 14 Defendants request spoliation sanctions. *Id.* at 5.

15 Plaintiffs counter that they “did not destroy or intend to destroy any evidence related to or
 16 relevant to anticipated litigation” and, therefore, no sanctions are warranted. ECF No. 91 at 5, 12.
 17 They explain Ms. Llera never told Ms. Guest to communicate by Signal and that, in any event,
 18 they did not communicate about Ms. Guest’s observations of the shooting underlying this
 19 litigation. *Id.* at 4, 8. Plaintiffs also assert that Defendants have not been prejudiced by the
 20 potentially lost Signal messages, which they continue to argue do not exist. In addition, Plaintiffs
 21 add that Ms. Llera’s “wanting to use the Signal app did not foreclose a meaningful defense,” as
 22 other discovery (such as other communications, declarations, and depositions) would enable
 23 Defendants to prepare an effective defense. *Id.* at 6, 12. Finally, Plaintiffs note that “any requested
 24 sanction on this basis would not apply to Mr. Gomez.” *Id.* at 3, 12.

25 **B. Legal Standard**

26 “Spoliation is the destruction or significant alteration of evidence, or the failure to
 27 preserve [evidence,] . . . in pending or reasonably foreseeable litigation.” *United States v. Kitsap*
 28

1 *Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002). Fed. R. Civ. P. 37 (“Rule 37”) authorizes
 2 the Court to sanction non-adherence to discovery rules, including spoliation of evidence.

3 Before determining whether the Court should impose sanctions, Rule 37(e) requires the
 4 Court to assess the following four criteria: (1) whether the information qualifies as electronically
 5 stored information (“ESI”); (2) whether there was a duty to preserve the ESI in the anticipation or
 6 conduct of litigation; (3) whether the ESI was lost because a party failed to take reasonable steps
 7 to preserve it; and (4) whether the ESI can be restored or replaced through additional discovery. If
 8 those criteria are met, and the reviewing court finds there is “prejudice to another party from [the]
 9 loss of the [ESI],” the Court may “order measures no greater than necessary to cure the
 10 prejudice.” Fed. R. Civ. P. 37(e)(1).

11 If, however, the party who was supposed to preserve the ESI “acted with the intent to
 12 deprive another party of the information’s use in the litigation,” the Court may authorize the
 13 following sanctions:

14 (A) presume that the lost information was unfavorable to the party;
 15 (B) instruct the jury that it may or must presume the information was unfavorable to the
 16 party; or
 17 (C) dismiss the action or enter a default judgment.

18 Fed. R. Civ. P. 37(e)(2).

19 Terminating sanctions under Rule 37(e)(2)(C) are “very severe.” *Connecticut Gen. Life*
 20 *Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). However, they are
 21 appropriate when the Court finds “willfulness, fault, or bad faith.” *Leon v. IDX Systems Corp.*, 464
 22 F.3d 951, 958 (9th Cir. 2006).

23 “[T]he relevant standard of proof for spoliation sanctions is a preponderance of the
 24 evidence.” *Fast v. GoDaddy.com LLC*, 340 F.R.D. 326, 335 (D. Ariz. 2022) (citations omitted).

25 **C. Analysis**

26 First, the Signal communications constitute ESI for purposes of a Rule 37 analysis. *See*
 27 *Oppenheimer v. City of La Habra*, No. SACV1600018JVSDFMX, 2017 WL 1807596, at *7
 28 (C.D. Cal. Feb. 17, 2017) (“Because the text messages and the e-mails are electronically stored
 information . . . this Court needs to apply Rule 37(e).”).

1 The next steps are to determine whether the ESI is “lost” because Plaintiff failed to take
 2 reasonable steps to preserve it and whether it can be restored or replaced through additional
 3 discovery. Fed. R. Civ. P. 37(e). “A party must show by competent evidence, which could take
 4 the form of expert testimony or other evidence, that the ESI sought was actually lost” and cannot
 5 be restored or replaced with additional discovery. *Colonies Partners, L.P. v. Cnty. of San*
 6 *Bernardino*, No. 518CV00420JGBSHK, 2020 WL 1496444, at *5 (C.D. Cal. Feb. 27,
 7 2020), *report and recommendation adopted*, No. 518CV00420JGBSHK, 2020 WL 1491339
 8 (C.D. Cal. Mar. 27, 2020) (citations omitted).

9 Here, the record establishes that, on November 12, 2020 and during the pendency of
 10 litigation, Ms. Llera messaged Ms. Guest, a material witness in this case, on the Signal app. Def.
 11 Exh. 11. The record further establishes that, on November 15, 2020, Ms. Llera activated a feature
 12 on her Signal app that automatically deleted her messages with Ms. Guest one day after they were
 13 sent. *Id.* Additionally, on June 21, 2022, Ms. Llera disabled the disappearing messages function
 14 so that messages would no longer delete after a day. *Id.* To (mostly) everyone’s surprise, Ms.
 15 Guest brought what she testified was the sum total of the Signal communications with Ms. Llera.
 16 ECF No. 113 at 14. A copy was provided to Defendants. *Id.* at 16–17.

17 The problem with Defendants’ argument is that even if this Court were to agree that
 18 additional Signal communications existed between Ms. Llera and Ms. Guest (besides those
 19 brought to court), Defendants have not established any such communications are actually lost and
 20 cannot be replaced or restored through additional discovery. Defendants argued in conclusory
 21 fashion that “the records of those [Signal] messages [between Ms. Guest and Ms. Llera] are
 22 forever gone.” *Id.* at 91. But they did not offer any evidence to support this claim. For example,
 23 they did not demonstrate that the phones of the parties in questions had been forensically
 24 inspected and that no messages were found or that they could not subpoena these “lost” messages
 25 directly from Signal.³ As a result, the Court cannot find spoliation. *See Fiteq Inc v. Venture*
 26 *Corp.*, No. 13-CV-01946-BLF, 2016 WL 1701794, at *2–3 (N.D. Cal. Apr. 28, 2016) (denying

27
 28 ³ At the evidentiary hearing, Ms. Llera testified, “I guess you can contact Signal and get it.” However, Defendants did not argue this was possible. ECF No. 113 at 73.

1 plaintiff's motion *in limine* for a spoliation jury instruction where plaintiff failed to show that ESI
 2 sought was not "restored or replaced through additional discovery" and failed "to prove that other
 3 responsive documents ever existed"); *see also Hugler v. Sw. Fuel Mgmt., Inc.*, No.
 4 16CV4547FMOAGRX, 2017 WL 8941163, at *9 (C.D. Cal. May 2, 2017) (denying party's
 5 request for sanctions for spoliation of emails and text messages because movant could not
 6 establish the ESI could not be restored or replaced with additional discovery).

7 **2. Ms. Llera's Signal Communications with Mr. Rayos**

8 **A. Parties' Arguments**

9 Defendants argue that the Court also should sanction Ms. Llera for "intentionally
 10 destroying her communications" with witness Rayce Rayos. ECF No. 77 at 2. They assert that
 11 Ms. Llera asked Mr. Rayos to communicate with her via Signal "during the pendency of this case
 12 and to subvert Defendants' discovery[.]" *Id.* at 3.

13 Plaintiffs submit that "Mr. Rayos never had the Signal application, so there are no
 14 communications which were lost." ECF No. 91 at 3, 8.

15 **B. Legal Standard**

16 The Court employs the same legal standard identified in analyzing Ms. Llera's Signal
 17 communications with Ms. Guest.

18 **C. Analysis**

19 As explained above, even if the Court agreed to the existence of any such
 20 communications, Defendants have not established by a preponderance of the evidence that any
 21 such communications could not be restored or replaced through additional discovery. *See Hugler*,
 22 2017 WL 8941163, at *8 (explaining that "if the despoiled information can be restored or
 23 replaced through additional discovery, the Court cannot impose sanctions under Rule 37(e)").

24 **3. Mr. Gomez's Removal of a Black Bag or Case from his Truck**

25 **A. Parties' Arguments**

26 Defendants next move to enter terminating sanctions against Plaintiff Jorge Luis "for
 27 removing evidence" from the truck he lent to his son Jorge Antonio to use on June 1, 2020. ECF
 28 No. 77 at 3, 17. Defendants submit that Jorge Luis found his truck in downtown Las Vegas, had it

1 towed to his law firm's office, and subsequently removed items from it. *Id.* at 3. Defendants
 2 believe that Jorge Luis removed a black case from the truck that they speculate contained a rifle
 3 with an illegal bump stock.⁴ *Id.* at 4.

4 Plaintiffs counter that Jorge Luis retrieved the truck he owned after it had received a
 5 parking ticket, and "there was no court order or search warrant for the vehicle which precluded
 6 him from removing any items from its cabin." ECF No. 91 at 4.

7 **B. Legal Standard**

8 Spoliation of evidence involves the destruction or significant alteration of evidence, or the
 9 failure to preserve property for another's use as evidence in pending or reasonably foreseeable
 10 litigation. *See United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002). A
 11 district court has the "inherent discretionary authority" to make appropriate evidentiary rulings in
 12 response to the destruction or spoliation of relevant evidence. *Glover v. BIC Corp.*, 6 F.3d 1318,
 13 1329 (9th Cir. 1993). This inherent authority includes the power to sanction the responsible party
 14 for failing to preserve material evidence. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306
 15 F.3d 806, 824 (9th Cir. 2002).

16 "Although the Ninth Circuit has . . . not set forth a precise standard for determining when
 17 spoliation sanctions are appropriate, the majority of trial courts have adopted the following test:
 18 (1) the party having control over the evidence had an obligation to preserve it at the time it was
 19 destroyed; (2) the records were destroyed with a culpable state of mind; and (3) the evidence was
 20 relevant to the party's claim or defense such that a reasonable trier of fact could find that it would
 21 support that claim or defense." *Dabney v. Wyoming Vapor Co., LLC*, No. 3:19-CV-00230-YY,
 22 2020 WL 5731819, at *4 (D. Or. July 10, 2020) (internal brackets, quotation marks, and citations
 23 omitted). "The party seeking spoliation sanctions bears the burden of establishing each element."
 24 *Id.* (citation omitted).

25 **C. Analysis**

26 At the outset, the Court notes that a claim of spoliation must rest on more than
 27 speculation. *See Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 631 (C.D. Cal. 2013) ("Mere

28 ⁴ Defendants refer to the black item as both a "case" and "garment bag." Compare ECF No. 77 at 3, 15 with *id.* at 16.

1 speculation that other deleted documents may exist that might be helpful to a party’s case is also
 2 an insufficient basis for a finding of spoliation.”); *see also Galicia v. Nat’l R.R. Passenger Corp.*,
 3 No. CV 17-8020-JFW (JCX), 2018 WL 6314191, at *4 (C.D. Cal. July 20, 2018) (“The case law
 4 on spoliation is clear that the burden for showing spoliation occurred requires more than a mere
 5 suggestion or implication.”) (citations omitted).

6 Defendants argue that Jorge Luis removed a black case or garment bag from his truck.
 7 ECF No. 77 at 3, 15, 16. They submit that the tow truck driver saw this black case in the truck
 8 and that it “likely contained another rifle with an illegal ‘bump stock’” *Id.* at 4. Contrary to
 9 Defendants’ representations, tow truck driver Benjamin Avila testified at his deposition that the
 10 case he saw in Jorge Luis’ truck was *not* a rifle case.⁵ ECF No. 112-1 at 18. He further testified
 11 that he believed the case was for a musical instrument. *Id.* at 18–19.

12 Defendants ask the Court to assume the truck contained a rifle with an illegal bump stock
 13 despite the fact that the only evidence in the record suggests otherwise. Defendants “must do
 14 more than speculate that evidence exists and must present evidence to the Court that the evidence
 15 existed at one time.” *Scalia v. Cnty. of Kern*, 576 F. Supp. 3d 703, 716 (E.D. Cal. 2021) (citations
 16 omitted). Defendants also generally argue without any supporting evidence, that “[t]he missing
 17 black case could also have contained documents reflecting Jorge Antonio’s plan to commit
 18 violent acts against the police.” ECF No. 77 at 16. While Defendants rely on documents that
 19 Jorge Antonio had allegedly authored regarding his thoughts on protesting (*id.* at 16–17), they
 20 have not presented any evidence that would establish any such documents would be found in this
 21 black case or garment bag.

22 Given the above, Defendants have not established that spoliation is at play and, thus, no
 23 sanctions should be imposed. *See Scalia*, 576 F. Supp. 3d at 717.

24 **4. Communications and Documents Related to the Towing of Jorge Luis’ Truck**
 25 **1. Parties’ Arguments**

26 Defendants argue that Plaintiffs engaged “[i]n yet another example of willful spoliation”
 27 by “spoliat[ing] documents and communications related to the truck’s towing.” ECF No. 77 at 17.

28 ⁵ Mr. Avila also testified that he saw a camera with a tripod in the truck. ECF No. 112-1 at 18.

1 They assert that these towing communications and documents are “relevant to the truck’s contents
 2 before Jorge Luis entered it and why he moved and entered the truck” and “relevant to when
 3 Jorge Luis learned of the truck’s location and whether he lied to LVMPD when he claimed he did
 4 not know its location.” *Id.* at 18. As a result, they ask the Court to issue terminating sanctions or,
 5 in the alternative, an adverse inference instruction. *Id.*

6 Plaintiffs counter that Jorge Luis sought LVMPD’s assistance in locating his truck (that
 7 contained his wallet) only to be told that they could not help and that the department was not
 8 interested in the truck should he find it. ECF No. 91 at 8. They also argue that Plaintiffs have not
 9 destroyed or intended to destroy evidence relevant to this litigation and, in any event, Defendants
 10 have not suffered prejudice. *Id.* at 5–6.

11 **2. Legal Standard**

12 The Court adopts the same legal standard as that used in analyzing the contents of Jorge
 13 Luis’ truck.

14 **3. Analysis**

15 Defendants do not explain *how* these communications and documents are relevant to the
 16 *claims and defenses* in this case, and the Court cannot manufacture arguments for litigants. *See*
 17 *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (citation omitted).
 18 As a result, the Court finds that Defendants have not met their burden in showing these materials
 19 are relevant. In light of this finding, the Court need not reach the other factors.

20 **III. Conclusion**

21 **IT IS THEREFORE ORDERED** that Defendant’s Motion for Sanctions (ECF No. 77)
 22 is DENIED.

23
 24 DATED: March 31, 2023.

25 
 26 BRENDA WEKSLER
 27 UNITED STATES MAGISTRATE JUDGE
 28